# Petition

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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1981

STATE OF ALASKA,
*Petitioner,*

vs.

JOHN HEFFLE, ARCTIC JOHN ETALOOK,
DELBERT J. THRONSEN, JACK K. MORRY,
LOUISA MORRY,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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## QUESTION PRESENTED

Whether the grant of civil jurisdiction to the States conferred by 28 U.S.C. § 1360 empowers a state court to enjoin, pending adjudication of title in the proper federal forum, the obstruction of a public highway by the Eskimo owner of restricted property where he claims title to the state highway right-of-way across his property.

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LOUISA MORRY,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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The petitioner State of Alaska respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alaska entered in this proceeding.

## OPINIONS BELOW

The judgment and opinion of the Supreme Court of Alaska (App. A, *infra*, A-1-A-18) is reported at 633 P.2d 264 (Alaska 1981). The judgment of the Superior Court of Alaska, Fourth Judicial District, (App. B, *infra*, A-19-A-20) is not reported.

## JURISDICTION

The judgment and opinion of the Supreme Court of Alaska (App. A, *infra*, A-1-A-18) was rendered on September 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## STATUTES INVOLVED

28 U.S.C. § 1360 provides:

State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| Alaska | All Indian country within the Territory |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property,

including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not consistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

## STATEMENT

Respondent Etalook received patent for a 160 acre Native allotment under the Alaska Native Allotment Act of 1906 (34 Stat. 197; formerly 43 U.S.C. §§ 270-1—270-3, as amended) on August 22, 1975. The allotment is located in a remote region of Alaska north of Fairbanks. On May 27, 1975, while Etalook's application for a Native allotment was pending, Etalook executed a conveyance for a road right-of-way to certain pipeline companies which in turn assigned their interest to the State of Alaska.[1] The road right-of-way consisted of a 13.90 acre portion of Etalook's allotment. Etalook received compensation greatly in excess

[1]The State of Alaska is also owner of this property by operation of law. See Alaska Statute 38.35.130.

of the fair market value of the property conveyed. During the negotiations for the acquisition of the right-of-way Etalook was represented by an atorney, an official of the Bureau of Indian Affairs, respondent Heffle, and several other friends and relatives.

At the time of the conveyance the BIA took the position that it lacked jurisdiction to approve the conveyance pursuant to 25 CFR § 161.3(b), until such time as the Bureau of Land Management issued a patent to the allotment to Etalook. However, a letter of non-objection to the conveyance was executed by the superintendent of the Fairbanks Office of the BIA.

The road right-of-way was obtained from Etalook to enable construction of the North Slope Haul Road, a public highway built to serve the North Slope oil fields and the Trans Alaska Pipeline. It is now known as the Dalton Highway.

In November of 1978 the State of Alaska and Alyeska Pipeline Service Company, representative of the pipeline companies who received the conveyance from Etalook, made a joint application to the Secretary of the Interior to approve and confirm the highway right-of-way across Etalook's allotment. Approval was denied, and an action for judicial review of the Secretary's decision has been commenced in federal court by the State.

After disagreements over the use of the Dalton Highway, Etalook disavowed the conveyance to the pipeline companies. The respondents erected a barricade across the highway on May 17, 1979, and again on June 23-24, 1979. The barricade was within the Dalton Highway right-of-way

where it crossed Etalook's allotment. Respondents attempted to charge road use tolls to truck drivers and others using the road.

Upon motion by the State of Alaska, the superior court of Alaska, Fourth Judicial District, granted a temporary restraining order on June 24, 1979 enjoining respondents' conduct barricading the Dalton Highway and interfering with its use. In due course the superior court also issued a preliminary injunction and a permanent injunction enjoining such conduct. Prior to entry of the preliminary injunction Etalook removed the controversy to the United States District Court. However, U.S. District Court Judge James A. Von der Heydt remanded the matter back to the superior court on the basis that "the cause of action is within the jurisdiction of the state courts and not within the original jurisdiction of the federal courts." Memorandum and Order, dated July 19, 1979, *State v. Heffle et al.*, No. F79-23 Civil, United States District Court for the District of Alaska. (App. D, *infra* A-23-A-24). The final judgment for a permanent injunction was entered by the superior court on October 31, 1979. A timely appeal was taken by respondents, and on September 15, 1981 the Alaska Supreme Court in a split decision reversed the judgment of the superior court. *Heffle v. State,* 633 P.2d 264 (Alaska 1981). Two of the five justices of the Alaska Supreme Court dissented from the decision.

The Alaska Supreme Court reversed the superior court judgment on the sole ground that 28 U.S.C. § 1360(b) was a bar to state court jurisdiction to enjoin the conduct complained of by the State. See *Heffle v. State,* 633 P.2d 264, 267-269 (Alaska 1981). (App. A, *infra* A-4-A-18).

## REASONS FOR GRANTING THE PETITION

By deciding that 28 U.S.C. § 1360(b) is a bar to State court jurisdiction to grant injunctive relief in the State's action to prevent interference with travel on the Dalton Highway, the Alaska Supreme Court has decided an important question of federal law which has not been, but should be, settled by this court. The importance of a resolution of the issue lies in the ability of the State to maintain peace and order on a public highway pending adjudication in the proper federal forum of an Eskimo's alleged right to the land crossed by the highway. If the Alaska Supreme Court decision is not reversed, its unduly restrictive interpretation of 28 U.S.C. § 1360(b) casts doubt on whether the State can obtain interim injunctive relief to prevent unlawful interference with public use of a highway.

28 U.S.C. § 1360(a) is a general grant of State jurisdiction in civil causes of action to which Indians[2] are parties. It provides *inter alia* that Alaska shall have jurisdiction over such actions to the same extent that Alaska has jurisdiction over other civil causes of action. The only limitation on this jurisdiction is contained in 28 U.S.C. § 1360(b), the pertinent part of which provides that this statute shall not "confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such [restricted] property or any interest therein." Therefore, only if the injunctive relief granted by the lower state court in this case is construed to be an

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[2]Although Respondent Arctic John Etalook is Eskimo, 28 U.S.C. § 1360 nevertheless is applicable to him. See *Pence v. Kleppe*, 529 F.2d 135, 138, n5 (9th Cir. 1976).

adjudication of Etalook's ownership or right to possession of his claim to the state right-of-way was the state court without jurisdiction to hear the matter.

The Alaska Supreme Court based its decision in this case on a holding that the injunctive relief granted by the lower court necessarily required an adjudication of the type proscribed by 28 U.S.C. § 1360(b). (App. A, *infra* A-4). The decision, while recounting various policy considerations regarding the federal government's responsibility to the Indian, nevertheless fails to explain why the court holds that ". . . this action requires an adjudication of ownership and other interests in property" claimed by Etalook. (App. A, *infra*, A-4). Petitioner submits that the Alaska Supreme Court decision is not only illogical, but that it contravenes the intent of the statute to give the state court jurisdiction in this type of controversy.

The majority in the court below relies on *Ollestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska 1977), *cert. denied*, 434 U.S. 938 (1977) and *Calista Corporation v. Mann*, 564 P.2d 53 (Alaska 1977) in support of its holding. However, as noted in Justice Matthews' dissenting opinion, reliance on these decisions is misplaced. Justice Matthews states:

> In prior cases we have construed § 1360 to preclude state court jurisdiction to grant the declaratory relief sought, on the grounds that it would necessarily implicate questions of title to trust property. *Ollestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska 1977), *cert. denied*, 434 U.S. 938, 54 L.Ed. 2d 297 (1977); *Calista Corporation v. Mann*, 564 P.2d 53 (Alaska 1977).

> However, an injunction differs from a declaratory judgment, in that ownership rights to property are not necessarily affected. Many courts have held in a variety of contexts that where title is in dispute and resolution of the dispute is pending in another forum, the court may grant a conditional injunction to preserve the status quo upon a prima facie showing of title or of present possession. The injunction is vacated if title is eventually determined adversely to the party in whose favor it runs. (App. A, *infra*, A-13).

Petitioner submits that the dissenting opinion is the more reasoned analysis. Because an injunction, permanent or otherwise, is subject to modification or dissolution if circumstances have changed since issuance, the superior court in this case had the power to vacate the injunction if title was eventually adjudicated adversely to the State.[3] The majority opinion ignores both the nature of the injunction granted by the superior court, and the superior court's equitable powers to modify or dissolve it at such time as title is determined. Further, in contradiction to the holding of the majority, this court may note that the superior court had no difficulty in enjoining the obstruction of the highway, and at the same time *not* adjudicating the title

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[3]In order not to conflict with 28 U.S.C. § 1360(b), petitioner concedes that the injunctive relief granted would have to be subject to dissolution upon adjudication in the proper federal forum that Etalook owned the portion of the right-of-way which crossed his allotment. It is settled law that the court issuing the injunction retains jurisdiction to dissolve or modify it if circumstances, whether of law or fact, have changed since issuance. *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 437 (1976); *System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*, 364 U.S. 642 (1961).

to the property, i.e., an adjudication of Etalook's property interest was not, in fact, necessarily required. (In the preliminary injunction the superior court expressly found that it had no jurisdiction to determine the title to the property in question. App. C, *infra*, A-22.)

As noted by this Court in *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976), the legislative history for section 1360(b) is sparse. But such legislative history as there is indicates that the primary concern of Congress in enacting Public Law 280, of which § 1360(b) is a part, was to enable states to control lawlessness on Indian reservations and in Indian country. *Id.* at 379. Etalook's native allotment is defined by 18 U.S.C. § 1151 to be Indian country.[4] As the instant case involves lawlessness on the part of respondents in the sense that they purposefully obstructed an important state highway in direct contravention of state law[5] in order to assert a claim to what they perceived to be a part of Etalook's native allotment, jurisdiction over this matter by a state court is consistent with the legislative history.

More fundamentally, the Alaska Supreme Court's decision to refuse to allow state court jurisdiction in the face

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[4]See, 1958 U.S. Code Cong. and Adm. News, p. 3347 which makes it clear that the definition of "Indian country" in 18 U.S.C. § 1151 is applicable to 28 U.S.C. § 1360.

[5]See Alaska Statute 11.20.590; Alaska Statute 19.25.20; Alaska Statute 28.35.140. See also the judgment of the superior court which provides in part:

> "3. Defendants [Respondents herein] have unlawfully impeded, impaired, and otherwise obstructed the passage of traffic, material, and individuals along this highway." (App. B, *infra*, A-20).

of a federal court decision expressly holding that the matter is within the jurisdiction of state courts, shirks the responsibility of a court to hear and decide controversies. In this case, after the State moved for a preliminary injunction, respondents removed the action to the federal district court. In its Memorandum and Order (in which the matter was remanded back to state court), the federal court found "plaintiff's [the State's] amended complaint to state only a cause of action for obstruction of a state highway under state law. Such a cause of action is within the jurisdiction of the state courts and not within the original jurisdiction of the federal courts." (App. D, *infra,* A-23). Further, in this order the federal court also recognized that 28 U.S.C. § 1360(b) deprived "state courts of jurisdiction to adjudicate title, claim or rights to interests in property held in trust for Alaskan Natives" (App. D, *infra,* A-24), thus implicitly recognizing that the case before it did not involve such an adjudication. This decision by a federal district court interpreting a federal statute, while not binding upon the state court under the supremacy clause, should have been considered as persuasive authority by the Alaska Supreme Court. See *State ex rel. Apodaca v. Fiorina,* 495 P.2d 1379, 1388 (N.M. 1972); *People v. Bradley,* 460 P.2d 129, 132 (Cal. 1969). Further, because the federal district court decision was in the same case that was before the state court, the federal ruling should also have been considered as establishing the law of the case. See *Falgout v. People,* 459 P.2d 572, 577 (Colo. 1969); *United States ex rel. Lawrence v. Woods,* 432 F.2d 1072 (7th Cir. 1970); 1B Moore's Federal Practice § 0.404[6] 501, 502, 522 n4 (2d ed. 1980).

The situation now faced by the State is that the Alaska Supreme Court and the federal court have each determined that they are without jurisdiction to hear this case, and each court has held that the other should hear the matter. There is no other forum from which the State could seek relief. The result is that should the State be faced with renewed highway obstruction, the State may be left with an emergency with neither the federal court nor the state court willing to grant appropriate injunctive relief to maintain the status quo. The state is effectively denied the fundamental right of access to a court. See *Silver v. Cormier,* 529 F.2d 161 (10th Cir. 1976).

A further disturbing aspect of the Alaska Supreme Court decision is its failure to recognize the genuine emergency which existed at the time a temporary restraining order was sought in state court. The Dalton Highway was purposefully and illegally blocked by Etalook and his representatives on Saturday, June 23, 1979. "No trespassing" and "private property" signs were placed on the roadway, and trucks were being stopped at the roadblock. (App. A, *infra,* A-3-A-4). After receiving word of this conduct from peace officers, the State moved for and received from the superior court in Fairbanks a temporary restraining order, granted at 7:12 p.m. on Sunday, June 24, 1979, and the matter was set down for a hearing the following week. As the affidavit in support of the State's Motion for Temporary Restraining Order shows, the State was presented with a situation where it needed immediate judicial relief to keep a public highway, vital to state and national interests, from being closed by the lawless acts of respondents. Even if there were a resident federal judge in

Fairbanks[6] that the State could have sought emergency injunctive relief from, as the order of the federal court in this case illustrates (App. D, *infra*, A-23-A-24), the federal court would not have accepted jurisdiction. Also, it would have been premature for the State to have plead a federal question in the nature of a request for an adjudication of title to the property at the time emergency relief was sought, as the State did not believe that there could be a good faith claim against its title to the right-of-way. After all, the highway had been built in 1974, the State's title derived from a conveyance executed by Respondent Etalook in 1975, more than fair consideration had been paid to Etalook, and he was represented by an attorney during negotiations for the conveyance. (App. A, *infra*, A-2-A-3). Under the circumstances it was clearly appropriate for the State to request emergency injunctive relief from the state court.

Justice Matthews' dissenting opinion in the Alaska Supreme Court decision points out that numerous court decisions have held that courts have jurisdiction to maintain the status quo until underlying questions of title, pending in a separate forum, are resolved. (App. A, *infra*, A-14-A-16). For example, see *Northern Pacific Ry. Co. v. McComas*, 250 U.S. 387 (1919); *Zimmerman v. McCurdy*, 106 N.W. 125 (N.D. 1906); *Mid-Continent Pipeline Company v. Emerson*, 396 P.2d 734 (Okla. 1964). An injunction issued to maintain the status quo would, therefore, not im-

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[6]Although there is a United States District Court in Fairbanks, there is no resident judge. Normally, when there is a matter to be heard by a federal judge, the judge travels to Fairbanks from Anchorage—some 360 miles.

plicate questions of title of Etalook's restricted property as long as the injunction is subject to dissolution once the question of title is resolved. By its nature an injunction is subject to modification of dissolution upon a change of circumstances. Further, the injunction in this case, because it goes no further than to maintain the status quo and public peace, would not impinge upon the effective administration of federal Indian policy or the legislative intent behind 28 U.S.C. § 1360(b).

## CONCLUSION

By holding that the injunctive relief granted by the lower court necessarily required an adjudication of Etalook's alleged property ownership, the Alaska Supreme Court has misconstrued 28 U.S.C. § 1360(b). The state's power to protect its rights and the rights of its citizens with respect to a major public highway in the state has been severely limited by an incorrect interpretation of 28 U.S.C. § 1360(b). It is submitted, therefore, that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Alaska.

Dated: December 8, 1981

Respectfully submitted,

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**(Appendices follow)**

## Appendix A

The Supreme Court of the State of Alaska

File No. 5079

[No. 2416—September 15, 1981]

John Heffle, Arctic John Etalook, Delbert J. Thronsen, Jack K. Morry, Louisa Morry, all unknown persons similarly situated,

Appellants,

vs.

State of Alaska,

Appellee.

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, James R. Blair, Judge.

Appearances: Clem H. Stephenson, Fairbanks, for Appellants. Larry D. Wood, Assistant Attorney General, Fairbanks, and Avrum M. Gross, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Connor, Burke, and Matthews, Justices, and Christopher Cooke, Superior Court Judge.*

CONNOR, Justice. MATTHEWS, Justice, joined by COOKE, Judge, dissenting.

*Cooke, Superior Court Judge, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

This is an appeal from a superior court judgment enjoining Arctic John Etalook and the other defendants from interfering with the passage of traffic over the North Slope Haul Road.

Prior to December 18, 1971, Etalook filed an application for a Native allotment under the Alaska Native Allotment Act of 1906, ch. 2469, 34 stat. 197 (formerly 43 U.S.C. §§ 270-1 to 270-3, as amended) with the Department of the Interior for a 160-acre parcel of land located by Nugget Creek near its juncture with the Middle Fork of the Koyukuk River. Section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. I 1977), repealed the Allotment Act, but permitted any allotment application pending on December 18, 1971, to be approved if the applicant desired the application process to continue. Etalook filed an additional application with the Fairbanks office of the Bureau of Land Management to express his interest in continued processing of his application. While Etalook waited for his allotment approval, the Trans-Alaska Pipeline Authoriziation Act of 1973, Pub. L. No. 93-153, 87 stat. 584 (codified at 43 U.S.C. §§ 1651-1655 (1976)) was enacted. Section 203(b) of the Pipeline Act, 43 U.S.C. § 1652(b), directed the Secretary of the Interior to issue rights-of-way across United States land for the pipeline and the Haul Road.

On May 2, 1974, the United States granted the right-of-way to the State of Alaska, subject to valid existing rights. Alyeska Pipeline Service Company, as agent for the state under AS 38.35.130, obtained a right-of-way agreement

from Etalook for the Haul Road on May 27, 1975. Alyeska paid Etalook $25,000 for the right-of-way. During the negotiation of the agreement Etalook was represented by an attorney, an official of the federal Bureau of Indian Affairs (B.I.A.), defendant Heffle, and several other friends and relatives. On August 22, 1975, the Bureau of Land Management issued Etalook a certificate of Native allotment.

At the time that the agreement was signed, the B.I.A. took the position that it lacked jurisdiction to approve the agreements until the Bureau of Land Management (B.L.M.) executed a certificate of allotment to Mr. Etalook, because until then he would not be the certified owner of the allotment. However, a letter of non-objection to the right-of-way agreement was executed by the superintendent of the Fairbanks office of the B.I.A. On August 22, 1975, the B.L.M. issued the certificate. Three years later, in November, 1978, the State of Alaska and Alyeska made a joint application to the Secretary of the Interior to approve and confirm the highway right-of-way across Arctic John's allotment. This application is currently pending before the B.I.A., which has indicated that the agreement cannot be approved without further investigation into the circumstances of Etalook's consent. Meanwhile, the road was built and is now part of the state highway system.

After disagreements over the use of the Haul Road, on May 17, and on June 23-24, 1979, the defendants, claiming to represent Etalook, constructed a barricade across the Haul Road at Mile 216, which was within Etalook's Native

allotment. The defendants attempted to charge road use tolls to truck drivers using the road. When threatened with arrest, they allowed trucks to pass unimpeded.

The state filed a motion for a preliminary injunction to prevent interference with a public highway. Etalook requested that the controversy be removed to the United States District Court, but removal was denied and the case was remanded to the state superior court. After entering a preliminary injunction, the court, on October 31, 1979, approved a permanent injunction against Etalook and the other defendants, restraining them from interfering with the Haul Road. The defendants appeal from the order entering the permanent injunction.

We hold that because this action requires an adjudication of ownership and other interests in property which is subject to a restriction against alienation imposed by the United States, the superior court did not have jurisdiction to enter the permanent injunction. 28 U.S.C. § 1360(b).

At the heart of this action is the question of whether the state has a valid easement across Etalook's Native allotment. The controlling jurisdictional statute states:

> "Nothing in this section shall authorize the alienation . . . of any real or personal property . . . belonging to any Indian . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; . . . or shall confer jurisdiction upon the State to adjudicate, in probate pro-

> ceedings or otherwise, the ownership or right to possession of such property or any interest thereon."

28 U.S.C. § 1360(b) (1976).[1]

The basis for the rights and responsibilities of the federal government in relation to Native Americans was first set forth in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), and in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). After acknowledging that the Cherokees were a state, *i.e.*, "a distinct political society," *Cherokee Nation*, 30 U.S. (5 Pet.) at 16, 8 L.Ed. at 30; *see Williams v. Lee*, 358 U.S. 217, 218, 3 L.Ed.2d 251, 253 (1959); Chief Justice Marshall explained that Native Americans were analogous to wards of the United States. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17, 8 L.Ed. at 31. In *Worcester*, Chief Justice Marshall emphasized the right of Native Americans to the territory within their distinct political communities, and that this right was guaranteed by the United States. 31 U.S. (6 Pet.) at 557, 561-62, 8 L.Ed. at 499, 501; *see* Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1215-18 (1975). In 1903, when South Dakota

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[1] 28 U.S.C. § 1360(a) provides:

> "Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory. . . ."

attempted to collect taxes on land improvements by the Sioux on their allotted lands, Justice Harlan noted that since the federal government caused the weakness and helplessness of Native Americans, the government had the duty and power of protection. *United States v. Rickert*, 188 U.S. 432, 437, 47 L.Ed. 532, 537 (1903). This power implied "an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." *Id.* at 439, 47 L.Ed. at 537. This line of judicial decisions led commentators to note that

> "[t]he controlling principle which prevents a [state] court . . . from exercising any power or jurisdiction to adjudicate any matter involving the transfer of any right, title, or interest in or to restricted allotted Indian lands is that the United States in the exercise of its plenary and exclusive power over the Indians and their property may adopt such measures as it may deem necessary and proper for their welfare and protection and the state courts without legislative authority have no power or jurisdiction to interfere with or circumvent those measures."[2]

F. Cohen, Handbook of Federal Indian Law 381 (U.N. Mex. Press 1979).

Congressional policy regarding Native Americans, following the initial explanation by the courts, has not been

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[2]The plenary power of Congress over the affairs of Native Americans was confirmed in Morton v. Mancari, 417 U.S. 535, 551-52, 41 L.Ed.2d 290, 301 (1974). The source of the Congressional power over Native Americans is implied from the United States Constitution and from the history of dealings between the federal government and various tribes. Board of County Comm'rs v. Seber, 318 U.S. 705, 715, 87 L.Ed. 1094, 1102-03 (1943).

consistent. Tension exists between two policy objectives. The first, discussed above, insulates Native Americans from state law and continues control by the federal government. The second reflects an assimilation into American culture and includes Native Americans as citizens of the state in which they reside, thus allowing state jurisdiction over Native Americans. In 1953, Congress enacted Public Law 280, chapter 505, to reconcile the two models.[3] Although the statute, now codified in part at 28 U.S.C. § 1360, granted jurisdiction to particular states over civil and criminal actions in Indian territory and involving Indians, it expressly reserved jurisdiction over questions of interests in allotted lands.[4] The legislative history for section 1360(b) is sparse, *Bryan v. Itasca County,* 426 U.S. 373, 379, 48 L.Ed.2d 710, 715 (1976); but the primary aim of the statute was to give the states jurisdiction to control lawlessness on Indian reservations. *Id.* at 379, 48 L.Ed.2d at 715-16. *See Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 661 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038, 50 L.Ed.2d 718 (1977). There is even less of an explanation for the grant of civil jurisdiction, *id.* at 381, 48 L.Ed.2d at 717; and only one mention of the reservation

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[3]For a longer discussion of the two policy objectives and the role played by Public Law 280, *see* Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U.C.L.A. L. Rev. 535 (1975)

[4]The language in 28 U.S.C. § 1360(b) reserving jurisdiction in civil matters involving interests in allotments is similar to the language in 18 U.S.C. § 1162(b) reserving jurisdiction in criminal matters involving the same issue.

of jurisdiction in matters involving interests in allotted lands.[8]

Allotments are a specific part of federal policy regarding Indian advancement. *In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 296 (N.D. Cal. 1977). *See Santa Rosa Band of Indians*, 532 F.2d at 665-66. Part of that federal policy is the restriction on the alienation of allotted lands until approved by a United States government official. *See* 43 C.F.R. § 2561.3(a) (1979). The approval is necessary to prevent non-Indians from taking unfair advantage of Native Americans. The Indian allotment scheme is so necessary to federal Indian policy that no state interference is permitted. *Santa Rosa Band of Indians*, 532 F.2d at 666. Because of the need to effectively implement federal policy and the long standing tradition of federal jurisdiction over the affairs of Native Americans and their lands, courts have strictly interpreted section 1360 against a broad grant of state jurisdiction over allotment lands. *See Bryan*, 426 U.S. at 381, 48 L.Ed.2d at 717; *Santa Rosa Band of In-*

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[8]The Senate Report briefly noted that:

> "As introduced, H.R. 1063 would have extended the criminal laws of the State of California to all Indian country within the State. Concurrently, it provided for withdrawal of the entire State from operation of the Federal Indian liquor laws; finally, provision was made for permitting the California State courts to adjudicate civil controversies of any nature affecting Indians within the State, except where trust or restricted property was involved."

S. Rep. No. 699, 83d Cong., 2d Sess., *reprinted in* [1953] U.S. Code Cong. & Ad. News 2409, 2411.

*dians*, 532 F.2d at 661; *Chino v. Chino*, 561 P.2d 476, 478 (N.M. 1977).[6]

The state alleged in paragraph III of its complaint that it received the right-of-way across the lands in question from Alyeska Pipeline Service Company, who received the right-of-way from the United States. Paragraph IV alleged that Etalook and the other defendants without "just title, claim, right, or interest" interfered with the right-of-way. It is basic that one may not successfully move for a restraining order to prevent obstruction of an easement if one does not have proper title to or rights in the easement. *See Metzger v. Bose*, 317 P.2d 128, 129 (Cal. App. 1957). *See generally* R. Powell, The Law of Real Property ¶ 420 (1979). Thus, to reach the conclusion that an injunction is proper in this controversy, the ownership of and interests in the easement which crosses Etalook's Native allotment must be adjudicated.

After the state moved for a preliminary injunction, Etalook requested removal of the action to the federal district court. Removal was denied in a memorandum opinion reasoning that the state's complaint was an action for "obstruction of a state highway under state law. Such a cause of action is within the jurisdiction of the state courts and not within the original jurisdiction of the federal courts." Denial was based on the "well-pleaded complaint" rule expressed by the United States Supreme Court in *Taylor v. Anderson*, 234 U.S. 74, 75-76, 58 L.Ed. 1218,

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[6] "[A]ny ambiguity in § 1360 should be construed in favor of the Indians . . . ." In re Humboldt Fir, Inc., 426 F. Supp. 292, 296 (N.D. Cal. 1977).

1219-20 (1914), and reaffirmed in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676, 39 L.Ed.2d 73, 84 (1974).

The decision as to the removability of this action would not, of course, preclude the federal district court from accepting original jurisdiction over a separate action brought on these same facts, if the facts invoking federal question jurisdiction are alleged on the face of the complaint. Indeed, the federal court's remand order specifically notes that "[a]ny adjudication of title, claim, right or interests in an Alaska Native Allotment held in trust by the United States or a determination of compensation for inverse condemnation of a Native Allotment is within the exclusive jurisdiction of the federal courts and must be determined in a separate action in this court." Since we conclude that the state courts cannot accept this case without improperly deciding questions reserved exclusively to the federal courts, it appears that filing the case in the federal court, with the federal questions presented on the face of the complaint, is the state's proper course if it wishes to pursue the matter further.

We have confronted issues of trust land ownership before. In *Ollestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska), *cert. denied*, 434 U.S. 938, 54 L.Ed.2d 297 (1977), Ollestead sought a declaratory judgment entitling her to land rights in the town of Tyonek as a member of a Native village corporation under 25 U.S.C. § 477. *Id.* at 33. We held that "[a] state court adjudication of questions of tribal membership would necessarily encompass issues of ownership or right to possession of property held in trust

and subject to restrictions on alienation." *Id.* at 36. Thus we concluded that the state court lacked jurisdiction under 28 U.S.C. § 1360. In *Calista Corporation v. Mann*, 564 P.2d 53 (Alaska 1977), Mann sought a declaratory judgment entitling her to shares of stock in two Native corporations as the adopted daughter of a deceased shareholder. *Id.* at 55. The ownership of stock was at the center of the controversy and by operation of 43 U.S.C. § 1606(h)(1) the stock was trust property within 28 U.S.C. § 1360(b). "Thus, absent a conferral of jurisdiction by the United States, other than 28 U.S.C. § 1360," we held that the state courts were without jurisdiction in that case. *Id.* at 58. In this action for injunctive relief, the determination of rights to an easement over a Native allotment is the center of the controversy. Consistent with the decisions in *Calista Corporation* and *Ollestead*, we hold that the courts of this state lack jurisdiction to adjudicate those rights.

The permanent injunction entered by the superior court on October 31, 1979, restraining the defendants from interfering with the Haul Road is vacated and the case is remanded to the superior court with directions to dismiss for lack of jurisdiction.

REVERSED and REMANDED.

MATTHEWS, Justice, with whom COOKE, Judge, joins, dissenting.

Issuance of an injunction under the facts of this case is consistent with the classic purposes of injunctive relief: maintenance of public order and peace, and of the status quo, pending adjudication of legal rights.[1]

The federal district court's memorandum order denying removal stated that the state's complaint presented "only a cause of action for obstruction of a state highway under state law. Such a cause of action is within the jurisdiction of the state courts and not within the original jurisdiction of the federal courts." *State of Alaska v. Heffle,* No. F79-23 (D. Alaska, July 24, 1979). However, the court went on to explain:

> The state courts do not have jurisdiction to adjudicate title, claim or rights to interests in property held in trust for Alaskan Natives. *Ollestead v. Native Village of Tyonek,* 560 P.2d 31, 33-34 (Alaska 1977); *Atkinson v. Haldane,* 569 P.2d 151, 167 n. 59 (Alaska 1977). *Cogo v. Central Council of Tlingit and Haida Indians of Alaska,* 465 F.Supp. 1286, 1290 (D. Alaska 1979); *State of Alaska v. Agli,* No. A76-261, Memorandum and Order (D. Alaska, June 22, 1979). 28 U.S.C. § 1360(b). Any adjudication of title, claim,

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[1] *See* Houck v Kroger Co., 555 S.W.2d 803, 806 (Tex. Civ. App. 1977); Chapple v. Hight, 131 S.E. 505, 506 (Ga. 1926). *See also* Owens v. Texaco, Inc., 368 S.W.2d 780, 782-83 (Tex. Civ. App. 1963) ("the last prior peaceable, exclusive possession of land will be upheld by the court so that the status quo may be protected until trial on the merits. Courts frown on self-help; to encourage the action on the part of defendants . . . in this case is to encourage breaches of the peace, friction and bloodshed. [Citations omitted].")

right or interests in an Alaska Native Allotment held in trust by the United States or a determination of compensation for inverse condemnation of a Native Allotment is within the exclusive jurisdiction of the federal courts and must be determined in a separate action in this court. *Minnesota v. United States,* 305 U.S. 382, 389 (1939). *McKay v. Kalyton,* 204 U.S. 458 (1907). *United States v. Clarke,* 590 F.2d 765 (9th Cir. 1979). *State of Alaska v. Agli,* Memorandum and Order (D. Alaska June 22, 1979). *Id.*

The majority opinion concludes, based on its reading of 28 U.S.C. § 1360 (1976), that because state courts have no jurisdiction to adjudicate title to Native land, they also lack jurisdiction to enjoin obstruction of a highway over Native land. I disagree.

In prior cases we have construed § 1360 to preclude state court jurisdiction to grant the declaratory relief sought, on the grounds that it would necessarily implicate questions of title to trust property. *Ollestead v. Native Village of Tyonek,* 560 P.2d 31 (Alaska 1977), *cert. denied,* 434 U.S. 938, 54 L.Ed.2d 297 (1977); *Calista Corporation v. Mann,* 564 P.2d 53 (Alaska 1977).

However, an injunction differs from a declaratory judgment, in that ownership rights to property are not necessarily affected. Many courts have held in a variety of contexts that where title is in dispute and resolution of the dispute is pending in another forum, the court may grant a conditional injunction to preserve the status quo upon a prima facie showing of title or of present possession. The injunction is vacated if title is eventually determined adversely to the party in whose favor it runs.

In a case closely analogous to the present case, *Zimmerman v. McCurdy,* 106 N.W. 125 (N.D. 1906), the North Dakota Supreme Court held that where competing claims to federal land were pending before the Land Department, which had exclusive jurisdiction over the question of title, an injunction in state court was proper to maintain the status quo and to protect the occupying claimant's possession against the other claimants' attempts to take forcible possession, until their respective rights could be determined by the federal agency. The court stated:

> The rightful claimant's possession or right to possession will always be protected or enforced against a trespasser by the appropriate action in court when that can be done without deciding a controversy of which the Land Department has exclusive jurisdiction. [Citations omitted].
>
> When, however, as in this case, the opposing claimant's rights are in litigation before the federal Land Office, and the courts have, therefore, no jurisdiction to decide which of the two opposing parties is the rightful claimant, the courts are not powerless to extend their aid to preserve the property and prevent destructive violence. The equity powers of the courts are sufficiently broad and elastic to do justice under such circumstances, without interfering with the jurisdiction of the federal Land Office officials to determine the ultimate rights of the claimant with respect to the land in controversy. Inasmuch as the plaintiff is in possession, and is contesting in the proper tribunal the validity of defendant's entry, upon which the latter's right to take possession depends, it is clearly improper for defendant to violently disposses plaintiff until the final

> result of the contest shall have disclosed which of the two have the better right.

*Id.* at 126.

In *Mid-Continent Pipe Line Company v. Emerson*, 396 P.2d 734 (Okla. 1964), there was no question of the state court invading federal jurisdiction, but there was a question of whether an owner of a pipeline right-of-way could enjoin the owner of the servient estate from interfering with its possession, where title was unclear. Stressing that the plaintiff was not asking that its title be determined but asking only for an injunction, the court stated:

> In the instant case Mid-Continent had been in peaceable possession of a portion of defendants' land for nearly two and one-half years. It was the defendants who were out of possession and sought to regain possession. . . .
>
> Whether defendants will be able to regain possession in a subsequent proceeding, or will be limited to an action in reverse condemnation, is not a decisive issue in this case and is not determined. We do hold that a threat of force and violence is not a proper remedy to obtain possession and such action should be enjoined.
>
> Unless an injunction is granted in this case the damages to be sustained by plaintiff and those whom it serves will be substantial. Plaintiff's possession should be maintained until the substantive and permanent rights of the parties may be determined by appropriate proceedings.

*Id.* at 736. Like the *Zimmerman* court, the court in *Mid-Continent* emphasized the fact of peaceable possession and the need to preserve the status quo.

Other authorities which hold that courts have jurisdiction to maintain the status quo until underlying questions of title, pending in a separate forum, are resolved are set forth in the margin.[2]

The injunction issued by the superior court should be modified to provide that it shall be of no force or effect in the event the B.I.A. does not confirm the right-of-way agreement. As so modified the injunction would be consistent with § 1360, as well as the policies underlying that statute. § 1360(a) provides state courts with jurisdiction to grant general equitable relief within "Indian country." That jurisdictional grant is qualified only to the extent that "rights to possession or ownership" of trust lands are being adjudicated. As used in § 1360(b), "possession" is properly read as essentially the equivalent of title, and not possession in the conditional sense at issue here. The right to possession has been the greatest ownership interest available to Native Americans with respect to much of their land, with legal title remaining in the federal gov-

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[2]Northern Pacific Ry. Co. v. McComas, 250 U.S. 387, 391, 63 L.Ed. 1049, 1053 (1919); Park & Tilford Import Corp. v. Hunter Baltimore Rye, Inc., 5 F.Supp. 888, 889 (S.D.N.Y. 1933); Olive Land & Development Co. v. Olmstead, 103 F. 568, 580 (S.D. Cal. 1900); Northern Pacific Ry. Co. v. Soderberg, 86 F. 49, 51 (N.D. Wash. 1898); Ex Parte Finley, 20 So.2d 98, 100 (Ala. 1944); Mobile & B. Ry. Co. v. Louisville & N. Ry. Co., 67 So. 244, 245-46 (Ala. 1914); Mengel & Bro. v. Norman, 81 So. 207 (La. 1919); Smith v. Shiebeck, 24 A.2d 795, 799 (Md. App. 1942); Rockaway Rolling Mill Corp. v. Delaware, L. & W. Ry. Co., 137 A. 650, 652 (N.J. Eq. 1927) *aff'd* 143 A. 334, 335 (N.J. App. 1928); Elliott v. Rich, 172 P. 194, 195 (N.M. 1918).

ernment,[3] and so § 1360(b) would have been ineffective to broadly protect Indian interests if only the term "ownership" had been used.

Although there is "sparse" evidence of the legislative intent behind § 1360,[4] it is reasonably clear that the bar of state interference with Indian trust land embodied in § 1360(b) was considered necessary for the effective administration of federal Indian policy,[5] and particularly

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[3]*See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 99 L.Ed. 314, 320 (1955); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 666 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038, 50 L.Ed.2d 748 (1977). *See also*, F. Cohen, *Handbook of Federal Indian Law*, at 411-12 (1942).

[4]Bryan v. Itasca County, 426 U.S. 373, 379, 48 L.Ed.2d 710, 715 (1976); Atkinson v. Haldane, *supra* at 165. As one commentator views it, "[m]ost likely, civil jurisdiction was an afterthought in a measure aimed primarily at bringing law and order to the reservations, added because it comported with the pro-assimilationist drift of federal policy, and because it was convenient and cheap." Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 U.C.L.A. L. Rev. 535 at 543-44 (1975).

[5]*See* United States v. Humboldt Fir, Inc., 426 F.Supp. 292, 296 (N.D. Cal. 1977); Cohen explains the rationale behind this policy:

> The controlling principle which prevents a court, whether state or federal, from exercising any power or jurisdiction to adjudicate any matter involving the transfer of any right, title, or interest in or to restricted allotted Indian lands is that the United States in the exercise of its plenary and exclusive power over the Indians and their property may adopt such measures as it may deem necessary and proper for their welfare and protection and the state courts without legislative authority have no power or jurisdiction to interfere with or circumvent those measures.

F. Cohen, *supra*, at 381 (footnotes omitted).

for the preservation of Indian property.[6] The injunction issued in this case, as modified, would not have the potential to frustrate these purposes.

Moreover, the district court's decision in *State of Alaska v. Heffle*, No. F79-23 (D. Alaska, July 24, 1979), construed § 1360(b) as not precluding the injunctive relief sought by the state in this case. This decision by a federal court interpreting a federal statute, while not binding upon this court under the supremacy clause, is nonetheless persuasive authority. It also may be considered as establishing the law of the case. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970); 1B Moore's Federal Practice § 0.404[6] 501, 502 (2d ed. 1980). And while the law of the case doctrine permits departure from earlier rulings where clearly warranted, such rulings should in the great majority of cases be adhered to in order to impart a measure of order to litigation. This is especially true with respect to rulings as to which of two courts should hear a particular case; otherwise an unseemly, costly, and time consuming shuttling of cases between courts—the situation here—will result.

For these reasons the injunction issued by the superior court should be modified to be made conditional on the B.I.A.'s decision concerning the right-of-way agreement; as so modified the injunction should be affirmed.

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[6] *See* Santa Rosa Band of Indians v. Kings County, 532 F.2d at 664; *see also* Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 Cal. L. Rev. 1261, 1266-74 (1971); Israel & Smithson, *Indian Taxation, Tribal Sovereignty & Economic Development*, 49 N.D.L.R. 267, 283 (1973).

## Appendix B

In the Superior Court for the State of Alaska

Fourth Judicial District

No. 4FA-79-1180 Civ.

State of Alaska,
Plaintiff,

vs.

John Heffle; Arctic John Etalook; Delbert J. Thronsen; Jack K. Morry; Louisa Morry; All Unknown Persons similarly situated,
Defendants.

[Filed Oct. 31, 1979]

### JUDGMENT

This matter came before the court upon motion by the State of Alaska for summary judgment; and the matter has been fully briefed and argued. The court therefore makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. This court has jurisdiction of this case and of the subject matter of this litigation.

2. The State of Alaska is maintaining and operating what is commonly known as the North Slope Haul Road which is a public highway extending from the Yukon River to Prudhoe Bay, Alaska.

3. Defendants have unlawfully impeded, impaired, and otherwise obstructed the passage of traffic, material, and individuals along this highway.

4. A right-of-way for this public road does pass through the Native allotment of Arctic John Etalook.

5. That such acts of the defendants have and will cause irreparable injury and damage to the plaintiff.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the defendants, their agents, servants, employees, and attorneys, and those unknown persons in active concert or participation with them are permanently enjoined from impeding, impairing, blockading, or in any way interfering with the passage of traffic, material, and individuals along, over, and across the highway, commonly referred to as the North Slope Haul Road.

This Judgment may be enforced by any peace officer.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff be awarded the amount of $2,000.00 as attorney's fees plus EIGHT PERCENT (8%) interest per annum until paid.

DATED at Fairbanks, Alaska, this 31st day of October, 1979

/s/ JAMES R. BLAIR

Superior Court Judge

## Appendix C

In the Superior Court for the State of Alaska

Fourth Judicial District

No. 4FA79-1180

State of Alaska,

Plaintiff,

vs.

John Heffle, Arctic John Etalook, Delbert J. Thronsen; Jack K. Morry; Louisa Morry; all unknown persons similarly situated,

Defendants.

[Filed Aug. 13, 1979]

### PRELIMINARY INJUNCTION

Plaintiff, State of Alaska, has moved for a preliminary injunction. The court makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT:

1. Defendants have received sufficient notice of the application for injunctive relief.

2. The State of Alaska is maintaining and operating the North Slope Haul Road which extends from the Yukon River to Prudhoe Bay, Alaska, and is extremely vital and important to the economy of the State of Alaska.

3. That the defendants herein on May 17, 1979, and June 24, 1979, blocked and stopped traffic on said Haul

Road and on June 24, 1979, collected tolls from travelers along said road.

4. That such acts of the defendants have and will cause irreparable injury and damage to the State of Alaska.

From the above findings of fact the Court makes and enters the following:

CONCLUSIONS OF LAW:

1. That this Court has jurisdiction of this case and of the parties to this action.

2. That this Court has no jurisdiction to determine the title to or to award any damages or compensation pertaining to any Restricted Native Allotment the title to which is held by the United States in trust for any Indian or Native.

3. That the plaintiff's application for a preliminary injunction should be granted to enjoin defendants from blocking or interfering with traffic on said Haul Road.

IT IS ORDERED that defendants and their agents, servants, employees and attorneys are enjoined, pending determination of this action, from impeding, impairing, blockading or in any way interfering with the passage of traffic, vehicles and individuals along, and over the road extending from the Yukon River to Prudhoe Bay, Alaska, commonly known and referred to as the North Slope Haul Road.

DATED: August 13, 1979

/s/ JAMES R. BLAIR

Superior Court Judge

## Appendix D

In the United States District Court

For the District of Alaska

No. F79-23 Civil

State of Alaska,

Plaintiff,

vs.

John Heffle, Arctic John Etalook, Delbert J. Thronsen, Jack K. Morry, Louisa A. Morry, all unknown persons similarly situated,

Defendants.

[Filed July 24, 1979]

### MEMORANDUM AND ORDER

THIS CAUSE comes before the court on plaintiff's motion to remand to the state court.

This court's jurisdiction must appear on the face of the well pleaded complaint. *Phillips Petroleum Co. v. Texas, Inc.*, 415 U.S. 125, 127-28 (1974). *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676 (1974). The court reads the plaintiff's amended complaint to state only a cause of action for obstruction of a state highway under state law. Such a cause of action is within the jurisdiction of the state courts and not within the original jurisdiction of the federal courts.

The state courts do not have jurisdiction to adjudicate title, claim or rights to interests in property held in trust for Alaskan Natives. *Ollestead v. Native Village of Tyonek,* 560 P.2d 31, 33-34 (Alaska 1977); *Atkinson v. Haldane,* 569 P.2d 151, 167 n. 53 (Alaska 1977). *Cogo v. Central Council of Tlingit and Haida Indians of Alaska,* 465 F. Supp. 1286, 1290 (D. Alaska 1979); *State of Alaska v. Agli,* No. A76-261, Memorandum and Order (D. Alaska, June 22, 1979). 28 U.S.C. § 1360(b). Any adjudication of title, claim, right or interests in an Alaska Native Allotment held in trust by the United States or a determination of compensation for inverse condemnation of a Native Allotment is within the exclusive jurisdiction of the federal courts and must be determined in a separate action in this court. *Minnesota v. United States,* 305 U.S. 382, 389 (1939). *McKay v. Kalyton,* 204 U.S. 458 (1907). *United States v. Clarke,* 590 F.2d 765 (9th Cir. 1979). *State of Alaska v. Agli,* Memorandum and Order (D. Alaska June 22, 1979).

Accordingly IT IS ORDERED:

THAT this cause is remanded to the Superior Court for the State of Alaska, Fourth Judicial District, Fairbanks.

DATED at Anchorage, Alaska, this 19th day of July, 1979.

/s/ JAMES A. VON DER HEYDT

United States District Judge

cc: Clem H. Stephenson
Larry D. Wood, Asst. Attorney General
Superior Court—Fairbanks

# Opposition

No. 81-1087

Office - Supreme Court, U.S.
FILED
FEB 8 1982
ALEXANDER L. STEVAS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

State of Alaska, Petitioner,

vs.

John Heffle, Arctic John Etalook, Delbert J. Thronsen, Jack K. Morry, and Louisa Morry,
Respondents.

On Appeal from Supreme Court of Alaska.

# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Attorney for Respondents

## QUESTION PRESENTED

Whether a state court can determine the ownership of and right of possession to a restricted Native Allotment in an injunction action under 28 U.S.C., Sec. 1360.

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## STATUTES INVOLVED

25 U.S.C. Sec. 357 states:

> "Condemnation of lands under laws of States
>
> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

28 U.S.C. Sec. 1360 states:

> State Civil Jurisdiction in actions to which Indians are parties
>
> (a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| Alaska | All Indian country within Territory |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State |

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may possess shall, if not consistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

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"Handbook of Federal Indian Law" by Cohen, (U.N.Mex Press 1979) page.381).....13

No. 81-1087

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1981

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State of Alaska, Petitioner,

vs.

John Heffle, Arctic John Etalook, Delbert J. Thronsen, Jack K. Morry and Louisa Morry,

Respondents.

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On Appeal from the Supreme Court of Alaska

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondents have no objections to the jurisdictional statement, Statute Involved or the Exhibits attached to the Petition for Certiorari.

STATEMENT

Certain Oil Companies who had leases

in the Prudhoe Bay field, without cost to the State of Alaska, built a road across a restricted Native Allotment of the respondent Arctic John Etalook without condemnation of a right of way and without securing an easement that was approved by the Secretary of Interior or his authorized representative.

The State of Alaska assumed the maintenance and operation of said road in October, 1979, and after the filing of the injunction action in the state trial court secured a conveyance of the interest of said oil companies (if they had any) in said road across said Native Allotment.

The allottee, Arctic John Etalook, assisted by the other respondents, who are native friends of the allottee, objected to the use of said road contending there was no valid easement or right of way for the same and erected No Trespassing signs on the road where it crossed the allotment and stopped vehicles on said allotment and charged cars and pickups $1.00 and trucks $2.00 for crossing said Native

allotment.

Petitioner refused to bring a condemnation suit in U. S. District Court under the provisions of Chapter 25, Sec. 357, U. S. C., but filed suit in the state trial court for an injunction to prevent respondents from charging said tolls. The state trial judge issued a Temporary Restraining Order with which the State of Alaska dispossessed respondents from said road where it crassed the Native Allotment.

Respondent Arctic John Etalook removed said case to the U. S. District Court and the State of Alaska moved to remand the same to the state trial court. The U. S. District Judge, Hon. James A. von der Heydt, remanded said case to the state trial court but set out in his Memorandum and Order* that the state courts do not have jurisdiction to adjudicate title, claim or rights to interests in property held in trust for Alaskan Natives.

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* (Appendix D to Petition for Certiorari.

Upon such remand the state trial court judge, Hon. James R. Blair, disregarding the statement made in the order remanding the case, issued a permanent injunction judgment* which stated that

> "A right-of-way for this public** road does pass through the Native Allotment of Arctic John Etalook."

Said trial court judge thereby attempted to determine a question of title in said state court case. Said state court judgment also enjoined respondents from interfering with the passage of traffic over said road---including where it passed over said Native allotment.

Respondents appealed said state court judgment to the Supreme Court of Alaska which entered an opinion and decision*** reversing the state trial court's injunction judgment.

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* Appendix B to Petition for Certiorari.

** Said road was not open to anyone except those to whom the State issued a permit to travel on road; Arctic John Etalook was denied such a permit.

*** Appendix A to Petition for Certiorari., reported at 633 P2d 264 (Alaska 1981)

Appellant, State of Alaska, has petitioned this Court for Writ of Certiorari to reverse the decision of the Alaska Supreme Court.

## SUMMARY OF ARGUMENT

Respondents contend that title 28 of U. S. C., Sec. 1360, specifically exempts from said authorization for suit by and against Indians in state court all suits to adjudicate the ownership of or right to possession of any restricted Native Allotment that is held in trust by the United States or is subject to restriction against alienation imposed by the United States.

## A R G U M E N T

It is the contention of respondents that 28 U.S.C, Sec. 1360, specifically exempts from the said statute and prohibits the bringing of suits in the state courts which require the determination of title to, or the right of possession of, any such restricted Native Allotment. The pertinent parts of said section, (b) reads as follows:

> "(b) Nothing in this section----shall confer jurisdiction upon the State to adjudicate----the ownership or right to possession of such* property."
>
> *("real---property---belonging to any Indian---that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States;")

There is no question that, under the exception set out in subsection (b) of the quoted section of the said statute that the State Courts are forbidden to exercise jurisdiction to try any such case.

By way of explanation at the time the State of Alaska brought it's suit in the state court it was the contention of the State that it had the power of inverse condemnation, or the right to take possession of a right of way across a restricted native allotment and that the native had to bring suit to recover any sum due him before the state would be forced to respond for the taking of such right of way. The assistant Attorney General who tried the case in the state trial court presented this theory to such trial judge. The

principle case relied upon by the State to establish such claimed right of inverse condemnation was the case of United States v. Clarke, 550 F.2d 765 (9th Cir. 1979). This case also involved a restricted Native Allotment over which an individual had built an unauthorized road which had eventually been turned to a subsidiary of the state which had power of eminent domain and condemnation. In the Clarke case the U. S. District Court held a valid easement had been obtained across said Native Allotment by Inverse Condemnation. The United States appealed and the Ninth Circuit upheld such Inverse Condemnation. The United States then appealed to this Court which reversed the lower courts in United States vs. Clarke, 445 US 253, 63 L Ed 2d 373, 100 S Ct 1127. In said opinion this Court held that Title 25, U.S.C. Sec. 357, did not authorize the condemning authority having the power of eminent domain to physically take possession and control of a road across a restricted Native Allotment and thereby force

the allottee to bring suit to recover the damages due for such taking.

It is, therefore, apparent that if it had not been for this Court's decision in the final opinion in U. S. v. Clarke (supra), the State of Alaska would have had the strongest of precedents upholding it's position that it had the right to take a right of way by physical force across a restricted Native Allotment and the only remedy of the allottee would be an action for Inverse Condemnation. However, even if this Court had not reversed the lower Clarke opinion, such suit would have to be brought in the U. S. District Court and not in a state trial court under 28 U.S.C., Sec. 1360 (b), under the decision in Minnesota v. U. S. (supra), and this, too, was pointed out by this Court in the final Clarke decision, where this Court said:

> "we hold that only in such a formal judicial proceeding may lands such as this be acquired,-------."

The State of Alaska, however now contends in it's Petition for Certiorari that the State

trial court, under the authority granted by 28 U.S.C., Sec. 1360, had the right to issue a Temporary Restraining Order dispossessing the Native Allottee----who was clearly in possession of the road across his premises since he was collecting tolls from those who used the same----and a permanent injunction enjoining said allottee and his agents from interfering with traffice across said Native Allotment "with neither the federal court nor the state court willing to grant appropriate injunctive relief to maintain the status quo". (Emphasis added, Page 11 of Petition for Certiorari). Counsel argued that the fact that the U. S. District Judge remanded the case to the State Trial Court was evidence that the State could not secure relief in the Federal Court. This was not the decision in the Memorandum and Order on such remand. In such Order the U. S. District Judge found (Appendix D to Petition for Certiorari) as follows:

> "This court's jurisdiction must appear on the face of the well pleaded complaint. (Citations omitted) The court reads the plaintiff's amended complaint to state only a cause of action for obstruction of a state highway under state law. Such a cause of action is within the jurisdiction of the state courts and not within the original jurisdiction of the federal courts."

Thus, by leaving out of such amended complaint the fact that the place where said road had the toll-gate was upon the restricted Native Allotment of Arctic John, the State secured the remand ot said case but said Federal District Judge, apparently realizing that said toll-gate was on a restricted Native Allotment, then stated in said Order:

> "The state courts do not have jurisdiction to adjdicate title, claim or rights to intersts in property held in trust for Alaskan Natives----------."

Said Federal District Judge then pointed out that any suits adjudicating title, claim, right or interests in an Alaska Native Allotment is within the exclusive jurisdiction of the Federal Courts. In their Petition for Cert-

iorari, however, the State of Alaska now claims that such order of remand indicated the state could not apply to the Federal District Court for injunctive relief.

It should be further pointed out that no action was then pending in any court to determine the rights of the parties, or test the validity of the purported easement which was not approved by the Secretary of Interior or his authorized representative. Furthermore no such suit was filed by the State of Alaska until after the Supreme Court of Alaska entered it's opinion in the case from which the state now seeks to appeal.*

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*Immediately after the Alaska Supreme Court Opinion became final the State of Alaska did file suit, which is now at issue, seeking (1) Injunctive relief against all the respondents herein to prevent them from interfering with the use of said road pending final determination of said action---which respondents did not oppose. (2) The establishment of the validity of the purported Right-of-Way Easement, or (3) the condemnation of a right-of-way across the restricted Native Allotment of Arctic John Etalook.

However the best argument this writer can make is the decision and authorities cited by the Supreme Court of Alaska in it's opinion in this case, Heffle, et al, v. Alaska, 633 P2d 264 (Alaska 1981). In said opinion the Alaska Supreme Court said:

"At the heart of this action is the question of whether the state has a valid easement across Etalook's Native allotment. The controlling jurisdictional statute states:

> 'Nothing in this section shall authorize the alienation...of any real or personal property...belonging to any Indian...that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States;...or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.'"

Said Opinion then goes on giving the history of the basis for the rights and responsibilities of the Federal Government in relation to Native Americans, citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). Cherokee Nation 30 U.S. (5 Pet.) at 16, 8 L.Ed. at 30; Williams v. Lee, 358 U.S. 218, 3 L.Ed..2d 251, 253, (1959); it

then states that Chief Justice Marshall explained that Native Americans were analagous to wards of the United States, Cherokee Nation 30 U.S. (5 Pet.) at 17, 8 L.Ed. at 31. Said opinion then points out that in 1903 when South Dakota attempted to collect taxes on land improvements of the Sioux on their alloted lands Justice Harlan noted that the government had the duty and power of protection. U. S. v. Rickert, 188 U.S. 432, 47 L.Ed. 532, 537 (1903). and that this power implied "an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." and that this line of judicial decision led comentators to note that

> "(t)he controlling principle which prevents a (state) court from exercising any power or jurisdiction to adjudicate any matter involving the transfer of any right, title, or interest in or to restricted allotted Indian lands is that the United States in the exercise of its plenary and exclusive power over the Indians and their property may adopt such measures as it may deem necessary and proper for their welfare and protection and the state courts without legislative authority have no power or jurisdiction to interfere with or circumvent those measures."

citing Cohen, Handbook of Federal Indian Law 381 (U.N. Mex. Press 1979).

Said opinion then goes on to state that Allotments are a specific part of federal policy regarding Indian advancement, citing authority, and that part of that federal policy is the restriction on the alienation of allotted lands until approved by a United States government official and that such approval is necessary to prevent non-Indians from taking unfair advantage of Native Americans, and that the Indian allotment scheme is so necessary to federal Indian policy that no state interference is permitted citing Santa Rosa Band of Indians, 532 F.2d 666. Said decision then points out that because of the need to effectively implement federal policy and the long standing tradition of federal jurisdiction over the affairs of Native Americans and their lands, courts have strictly interpreted section 1360 against a broad grant of state jurisdiction over allotment lands, citing Bryan, 426 U.S. at 381, 48 L.Ed.2d 717 and Santa Rosa Band of Indians, 532 F.2d 661; Chino v. Chino, 561 P.2d 476, 478 (N.M. 1977). which holds that "(A)ny ambiguity in Sec. 1360 should be construed

in favor of the Indians....." quoting with approval from In re Humboldt Fir, Inc., 426 F. Supp. 292, 296 (N.D. Cal 1977).

The Alaska Supreme Court then observed that it was basic that one may not successfully move for a restraining order to prevent obstruction of an easement if one does not have proper title to or rights in the easement, citing Metzger v. Bose, 317 P.2d 128, 129 (Cal. App. 1957) and R. Powell, "The Law of Real Property" Page 420 (1979). Said Court then says "Thus, to reach the conclusion that an injunction is proper in this controversy, the ownership of and interests in the easement which crosses Etalook's Native allotment must be adjudicated. Said opinion then comments as follows:

"After the state moved for a preliminary injunction, Etalook requested removal of the action to the federal district court. Removal was denied in a memorandum opinion reasoning that the state's complaint was an action for 'obstruction of a

state highway under state law. Such a cause of action is within the jurisdiction of the state courts and not within the original jurisdiction of the federal courts.' Denial was based on the 'well-pleaded complaint' rule expressed by the United States Supreme Court in Taylor v. Anderson 234 U.S. 74, 75-76, 58 L.Ed. 1218, 1219-20 (1914), and reaffirmed in Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 676, 39 L.Ed.2d 73, 84 (1974).

"The decision as to the removability of this action would not, of course, preclude the federal district court from accepting original jurisdiction over a separate action brought on these same facts, if the facts invoking federal question jurisdiction are alleged on the face of the complaint." The opinion then points out that the federal district judge specifically stated that "(a)ny adjudication of title, claim, right or interests in an Alaska Native Allotment held in trust by the United States or a determination of compensation for inverse condemnation of a Native Allotment is within the exclusive

jurisdiction of the federal courts and must be determined in a separate action in this (federal district) court."

Said opinion then states "Since we conclude that the state courts cannot accept this case without improperly deciding questions reserved exclusively to the federal courts, it appears that filing the case in the federal court, with the federal questions presented on the face of the complaint, is the state's proper course if it wishes to pursue the matter further.

The Alaska Supreme Court then commented that it had confronted the issues of trust land ownership before in Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska), cert. denied, 434 U.S. 938, 54 L.Ed.2d 297 (1977) where said court held that "(a) state court adjudication of questions of tribal membership would necessarily encompass issues of ownership or right to possession of property held in trust and subject to restrictions on alienation." and that thus they had concluded that the state court lacked jurisdiction under 28 U.S.C. Sec. 1360, and also

cited Calista Corporation v. Mann, 564 P.2d 53 (Alaska 1977) concerning the ownership of stock in two Native corporations as the adopted daughter of a deceased shareholder, pointing out that the ownership of the stock was the center of the controversy and by operation of the statute concerning such ownership the stock was trust property within 28 U.S.C. 1360 (b) and that absent a conferral of jurisdiction by the United States, other than 28 U.S.C. Sec. 1360, the state courts were without jurisdiction and that, consistent with the decisions in Calista Corporation and Ollestead, they held that the courts of Alaska lack jurisdiction to adjudicate those rights.

The reason for detailing the said opinion is to emphasise that the Alaska Supreme Court carefully, and properly, considered the question involved in said majority opinion and decided the same in accordance with the majority decisions on the questions involved as established by this Court.

## C O N C L U S I O N

In conclusion Appellants submit that the Alaska Supreme Court Majority opinion carefully considered and properly followed the precedent decisions of this Court and other appellate courts that are in harmony with the policies established by this Court and that said opinion should not be disturbed and the Petition for Certiorari of the State of Alaska should be denied.

Respectfully submitted February 4, 1982.

Clem H. Stephenson

Attorney for Respondents.